TJM Sdn Bhd v Muhamad Zamree bin Sulaiman & Ors

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO AA-24NCVC-1–01 OF 2018
MOHD RADZI JC
31 DECEMBER 2018

Civil Procedure — Striking out — Application for — Respondents applied to strike out applicant's originating summons — Whether applicant's originating summons statute barred under s 2(a) of the Public Authorities Protection Act 1948 — Whether applicant's originating summons scandalous, frivolous and vexatious or an abuse of the process of court — Public Authorities Protection Act 1948 s 2(a) — Rules of Court 2012 O 18 r 19

This was an application filed by the respondents pursuant to O 18 r 19(1)(b) and (1)(d) and O 92 r 4 of the Rules of Court 2012 ('the ROC') to strike out the applicant's originating summons ('the OS'). The respondent's main argument supporting their application was that the applicant could not proceed with its OS as it was time barred pursuant to s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA'). The applicant was the owner of a Bentley car which was seized by the first respondent pursuant to s 114 of the Customs Act 1967 ('the Act'). Subsequently the Bentley was forfeited vide a notice of forfeiture which was issued by the first respondent pursuant to s 128 of the same Act. The respondents contended that the said car was forfeited as it was parked at a place which was not a warehouse and without the Customs' authorisation in contravention of s 66(2) of the Act. The respondents' application was premised on the following grounds: (a) the applicant's claim was statute barred under s 2(a) of the PAPA; (b) the applicant's claim fell under the first limb of s 2(a) of the PAPA; (c) the period of limitation under s 2(a) of the PAPA was absolute and mandatory; and (d) the applicant's claim was obviously unsustainable. The issue to be determined by the court was that whether the applicant's OS was statute barred under s 2(a) of the PAPA.

Held, dismissing the application with no order as to costs:

(1) The counsel for the respondent did not answer as to why the notice of seizure dated 3 April 2014 although the seizure of the car was carried out on 8 January 2014, neither was there an explanation as to why the notice of forfeiture left undated. How could the appellant be expected to respond within one month from the date of seizure when the notice of seizure was only issued almost three months after the seizure. The court was fully appraised of the fact that it would and only deal with these issues substantively during the actual trial of the OS (see paras 20–21).

(2) Having perused the communications from the applicant to the respondents, the court found that the applicant's cause of action against the respondent commenced on 10 October 2017. As such, the court ruled that the OS was filed within the time provided in s 2(a) of the PAPA (see para 25).

(3) The court in determining an application under O 18 r 19(1) of the ROC could not deal with the merit of the substantive claim or attempt to resolve conflicts of evidence in striking out proceedings. Nonetheless, the court was entitled to look at the history of the case to determine if there was an action and to determine whether it could clearly be seen that the claim or answer was on the face of it obviously unsustainable. The summary power should be exercised in plain and obvious cases only and where the claim on the face of it was obviously bound to fail (see paras 22–23 & 27).

(4) 'Scandalous' was decided to mean wholly unnecessary and irrelevant, not just unpleasant allegations. The following illustrations had been decided to come within the meaning of the term 'frivolous' and 'vexatious': (a) no locus standi; (b) res judicata; (c) wrong party was sued; (d) illegality; (e) unfounded claims; and (f) claim was statute barred. Applying the above principle, the court did not find that the applicant's OS fell under any of the illustrations enumerated above for it to be scandalous, frivolous or vexatious. The respondents' claim under O 18 r 19(1)(b), therefore, failed. The respondents' claim under O 18 r 19(1)(d) also failed because there was no evidence of abuse of process of the court in the applicant's action (see paras 29–31 & 34).

[Bahasa Malaysia summary

Ini merupakan satu permohonan yang difailkan oleh responden selaras dengan A 18 k 19(1)(b) dan (1)(d) dan A 92 k 4 Kaedah-kaedah Mahkamah 2012 ('KKM') untuk membatalkan saman pemula pemohon ('SP'). Hujahan utama responden menyokong permohonannya adalah permohon tidak dapat meneruskan dengan SPnya kerana ianya dihadkan masa selaras dengan s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('AKPPBA'). Pemohon merupakan pemilik kereta Bentley yang dirampas oleh responden pertama selaras dengan s 144 Akta Kastam 1967 ('Akta'). Bentley tersebut kemudiannya dirampas melalui satu notis rampasan yang dikeluarkan oleh responden pertama selaras dengan s 128 Akta tersebut. Responden menghujahkan bahawa kereta tersebut dirampas semasa ianya diletakkan di tempat yang bukan merupakan satu gudang dan tanpa kebenaran pihak Kastam dan melanggar s 66(2) Akta tersebut. Permohonan responden berlandaskan alasan berikut: (a) tuntutan pemohon adalah dihalang statut dibawah s 2(a) AKPPBA; (b) tuntutan pemohon terjumlah dibawah bahagian pertama s 2(a) AKPPBA; (c) tempoh had masa dibawah s 2(a) AKPPBA adalah mutlak dan wajib; dan (d) adalah jelas bahawa tuntutan responden tidak boleh diteruskan.

Isu untuk diputuskan oleh mahkamah adalah sama ada SP pemohon adalah dihalang oleh statut dibawah s 2(a) AKPPBA.

Diputuskan, mengetepikan permohonan tanpa perintah kos:

(1) Peguam responden tidak menjawab mengapa notis rampasan bertarikh 3 April 2014 walaupun rampasan kereta dilakukan pada 8 Januari 2014, tiada juga penjelasan mengapa notis rampasan tidak bertarikh. Bagaimana perayu boleh membalas dalam tempoh satu bulan dari tarikh rampasan apabila notis rampasan hanya dikeluarkan hampir tiga bulan selepas rampasan. Mahkamah telah menilai fakta bahawa ianya hanya boleh berurusan dengan isu ini secara substantif sewaktu perbicaraan SP tersebut (lihat perenggan 20–21).

(2) Setelah meneliti komunikasi antara pemohon dan responden, mahkamah mendapati bahawa kausa tindakan pemohon terhadap responden bermula pada 10 Oktober 2017. Oleh itu, mahkamah memutuskan bahawa SP tersebut difailkan dalam tempoh masa yang diperuntukan dibawah s 2(a) AKPPBA (lihat perenggan 25).

(3) Mahkamah dalam menentukan satu permohonan dibawah A 18 k 19(1) KKM tidak boleh berurusan dengan merit tuntutan substantif atau cuba untuk menyelesaikan percanggahan keterangan dalam prosiding pembatalan. Namun, mahkamah berhak untuk melihat kepada sejarah kes untuk menentukan sama ada wujud satu tindakan dan untuk menentukan sama ada ianya jelas kelihatan bahawa tuntutan atau jawapan kepadanya tidak boleh diteruskan secara nyata. Kuasa ringkas hanya patut digunakan dalam kes nyata dan jelas sahaja dan apabila tuntutan tersebut adalah jelas akan gagal (lihat perenggan 22–23 & 27).

(4) Adalah diputuskan bahawa 'scandalous' bermakna secara keseluruhannya tidak perlu dan tidak relevan, bukan sahaja dakwaan tidak diingini. Mislan yang berikut telah diputuskan untuk terjumlah dibawah makna 'remah' dan 'menyusahkan': (a) tiada locus standi; (b) res judicata; (c) pihak salah telah disaman; (d) keharaman; (e) tuntutan tidak berasas; dan (f) tuntutan dihalang oleh statut. Menggunapakai prinsip diatas, mahkamah tidak mendapati SP pemohon terjumlah kepada mana-mana ilustrasi yang dinyatakan diatas untuk ianya menjadi *scandalous*, remeh atau menyusahkan. Tuntutan responden dibawah A 18 k 19(1)(b), oleh itu, gagal. Tuntutan responden dibawah A 18 k 19(1)(d) juga gagak kerana tiada keterangan penyalahgunaan proses mahkamah dalam tindakan pemohon (lihat perenggan 29–31 & 34).]

Notes

For cases on application for striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9281–9311.

Cases referred to

AIC Dotcom Sdn Bhd (suing in a representative capacity for MTEX Corp Sdn Bhd) v MTEX Corp Sdn Bhd [2003] 4 MLJ 324, HC (refd)

Abdul Hamid bin Hj Rahmat & Anor v Development & Commercial Bank Bhd & Anor [1993] 1 MLJ 306, HC (refd)

Alias bin Ismail v Hairuddin bin Mohamad & Anor [1997] 3 MLJ 724; [1997] 4 CLJ 669, CA (refd)

Alliance Investment Bank Sdn Bhd v Good Quantum Sdn Bhd & 3 Ors [2010] MLJU 1679, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2001] 4 AMR 4807, HC (refd)

Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 17 Ors [2008] 2 MLJ 915, HC (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 1 CLJ 69, SC (refd)

Datuk Ooi Han Eng & Anor v Soh Huang Siah (carrying on business through an organisation known as Alaric's Productions Co) [2010] 5 MLJ 665, CA (refd)

Duta Arif Sdn Bhd & Ors v Chartered Development Corp & Ors [2008] 6 MLJ 139, HC (refd)

EON Bank Berhad v Cepad Group Sdn Bhd & Ors [2006] 4 MLJ 362, HC (refd)

Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd [2006] 4 MLJ 271; [2006] 2 CLJ 1021, CA (refd)

Farlim Properties Sdn Bhd v Goh Keat Poh & Ors [2002] 6 MLJ 171, HC (refd)

Godrej Sara Lee Ltd v Siah Teong Teck & Anor (Part 1) [2007] 7 MLJ 153, HC (refd)

Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (refd)

Hi-Summit Construction Sdn Bhd v Konsortium Lapangan Terjaya Sdn Bhd & Ors [2015] 2 MLJ 247, CA (refd)

Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd [2013] 1 MLJ 406, CA (refd)

Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 2 MLJ 11, CA (refd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46, HC (refd)

Lim Eng Heng v Lim Sam Keow & Others [2003] MLJU 47, HC (refd)

Meeriam Rosaline a/p Edward Paul & Ors v William Singam a/l Raja Singam (suing as Public Officer of Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh, Perak) [2010] 4 MLJ 541, CA (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793, SC (refd)

Nescajaya Sdn Bhd v Suairah bt Parigula & Ors [2011] 9 MLJ 774, HC (refd)

Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd [1980] 2 MLJ 83, FC (refd)
Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156, HC (refd)
Public Finance Bhd v S Ramasamy [1990] 2 CLJ 431 (refd)
Sarjit Singh Khaira v Government of the State of Sarawak & Anor [1990] 2 MLJ 251; [1990] 2 CLJ 95; [1990] 3 CLJ Rep 59, HC (refd)
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235, CA (folld)
Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 7 MLJ 1, FC (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)
Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur (via his secretary Dato' Ahmad Tajudin bin Sulaiman) [2010] 8 MLJ 57, HC (refd)
Sim Kiang Chiok v Southeast Asia Special Asset Management Bhd [2016] 1 MLJ 57, CA (refd)
Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam [2011] 6 MLJ 70, CA (refd)
Tasja Sdn Bhd v Golden Approach Sdn Bhd [2011] MLJU 67; [2011] 3 CLJ 751, FC (refd)
Wesma Rubber Products v CIMB Bank Berhad [2014] 1 LNS 479 (refd)
Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240, FC (refd)
Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors [2009] 6 MLJ 863, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016)
Customs Act 1967 ss 66(2), 102, 114, 126, 128, 128(3)
Public Authorities Protection Act 1948 s 2(a)
Rules of Court 2012 O 18 r 19, 19(1), (1)(b), (1)(d), O 92 r 4

Mohd Hamizi bin Mohd Yusof (Raziyan Rahim & Assoc) for the applicant.
Fatin Hanum bt Abdul Hadi (Senior Federal Counsel, Perak State Legal Advisor's Office) for the respondents.

Mohd Radzi JC:

THE APPLICATION

[1] The application in encl 6 was filed by the respondents pursuant to O 18 r 19(1)(b) and (1)(d), and O 92 r 4 of the Rules of Court 2012 ('the ROC'), seeking this court, inter alia, to strike out the applicant's originating summons ('OS') dated 2 January 2018.

[2] The respondents' main argument supporting their application is that the applicant cannot proceed with its OS as it is time-barred pursuant to s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA').

[3] Consequentially, the OS must be strike out pursuant to the stated provisions of the ROC.

BACKGROUND

[4] A brief background facts on the matter are as follows:

(a) the applicant, a company registered under the Companies Act 1965, is the owner of a Bentley car, which was seized vide a notice of seizure dated 8 January 2014 issued by the first respondent pursuant to s 114 of the Customs Act 1967;

(b) on 3 April 2014, the said Bentley car was forfeited vide a notice of forfeiture, which was also issued by the first respondent, pursuant to s 128 of the same Act;

(c) the first respondent was, at the material time, the officer of customs at the Royal Malaysia Customs Enforcement Branch, Teluk Intan, Perak;

(d) the respondents contended that the said car was forfeited as it was parked at a place which was not a warehouse and without the customs' authorisation, in contravention of s 66(2) of the said Customs Act;

(e) it is the applicant's contention that it had taken various oral and written attempts to request for the said car to be returned but to no avail;

(f) these attempts, the applicant pleaded, include its letters to the respondents dated 14 April 2014, 20 May 2016, 25 May 2016, 1 September 2016 and 10 October 2017; and

(g) as the applicant's efforts failed, it then filed the OS against the respondents seeking, inter alia, for the following:

(i) a declaration that the seizure of the said car was null and void and ultra vires the provisions of the Customs Act 1967;

(ii) that the said car and the keys to the said car shall be returned to the applicant; and

(iii) special, general and exemplary damages to be awarded to the applicant.

THE APPLICATION

[5] The respondents' current application before this court was premised on the following four grounds:

(a) the applicant's claim is statute barred under s 2(a) of the PAPA; A

(b) the applicant's claim falls under the first limb of s 2(a) of the PAPA;

(c) the period of limitation under s 2(a) of the PAPA is absolute and mandatory; and

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(d) the applicant's claim is obviously unsustainable.

ISSUE BEFORE THIS COURT

[6] At the outset, it is the finding of this court that the four grounds C enumerated in the respondents' application above are, in actual fact, rested in only in one main issue that forms the substantive ground of the respondent's application to be considered by the court — was the applicant's OS statute barred under s 2(a) of the PAPA? If the answer is in the affirmative, this court will then moved to favourably consider and allow the respondents' application D in finding the OS to be unsustainable and must be struck out pursuant to O 18 r 19(1)(b) and (1)(d) of the ROC. If the answer to that question is in the negative, the reverse must be ordered by this court.

OUT OF TIME? E

[7] Before I deal with the substantive issue, it is prudent that at this juncture I deal with the third ground canvassed by the respondents in supporting their application, that the period of limitation under s 2(a) of the PAPA is mandatory. F

[8] For ease of reference, the said s 2(a) is reproduced as below:

> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect: G
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof; H

[9] That the time period mentioned in s 2(a) of the PAPA is absolute and I shall be complied with mandatorily is never disputed. This was not even disputed by the applicant in its affidavit or in the written or oral submissions of the counsel for the applicant. The elucidation of this position was also correctly pointed out by the counsel for the respondents in the authorities cited in

learned counsel's written submissions, namely *Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] MLJU 67; [2011] 3 CLJ 751; *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1; *Alias bin Ismail v Hairuddin bin Mohamad & Anor* [1997] 3 MLJ 724; [1997] 4 CLJ 669, *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 1 CLJ 69. But this court agrees with the respondents' counsel's arguments up to this point only.

[10] The absoluteness and mandatoriness of that s 2(a) of the PAPA is one thing. To prove that the applicant had legally breached that absolute and mandatory requirement is another thing altogether. I shall now turn to this very issue.

[11] The respondents argued that the cause of action alleged by the applicant arose on 8 January 2014, the date when the first respondent issued to the applicant the notice of seizure pursuant to s 114 of the Customs Act 1967.

[12] Applying s 2(a) of the PAPA, the respondents argued that the applicant's OS shall be filed within 36 months from 8 January 2014, the last date being 7 January 2017. The applicant filed the OS on 2 January 2018. If the date 8 January 2014 is taken as the date when the 36 months provided under s 2(a) of the PAPA begins to run, then this court calculated the delay as 11 months 25 days (8 January 2017–2 January 2018). The respondents, however, calculated the delay as 47 months and 25 days, computing it from 8 January 2014–2 January 2018.

[13] Consequentially, argued the respondents, the OS must be struck out pursuant to O 18 r 19(1)(b) and (1)(d) of the ROC 2012.

[14] The applicant argued that it had diligently fulfilled its part by communicating in writing with the respondents on numerous occasions, particularly vide its letters dated 14 April 2014; 20 May 2016; 25 May 2016; 1 September 2016; 10 October 2017 but without any reply from the respondents.

[15] It is the applicant's contention that the 36-month period for the applicant to file its action against the respondents shall be calculated commencing from the date when the applicant made its final attempt with the respondents, namely its letter dated 10 October 2017, and not the date of the notice of seizure. Thus, the 36 months would lapse on 9 October 2020. And as its OS filed on 2 January 2018, it was way within the time permitted under s 2(a) of the PAPA.

[16] I must briefly state the contents of those letters sent by the applicant to

the respondents. But before I do that, I must highlight the contents of the two notice of seizure and notice of forfeiture.

[17] The notice of seizure contained the following key information:

(a) there was a portion on the above part of the notice stating 'AR Berdaftar/Serahan Kendiri';

(b) the said notice was issued pursuant to s 114 of the Customs Act 1967;

(c) the first respondent seized the car on 8 January 2014 at 1930 for its infringement of s 66(2) of the Customs Act;

(d) although the seizure date was 8 January 2014, the date of this notice of seizure was 3 April 2014, yes, 3 April 2014;

(e) pursuant to s 126 of the Customs Act, if the applicant fail to claim the car within one month from the date it was seized, the car will be forfeited pursuant to s 128(3) of the Customs Act; and

(f) notice was given to the applicant to make a written claim on the seized car within one month from the date of seizure.

[18] The notice of forfeiture, on the other hand, was an undated notice. It was signed by the first respondent, informing that the said car will be forfeited if there is no prosecution proceeded and if the applicant does not claim within one month from the date of seizure.

[19] Section 102 of the Customs Act provides that any notices to be served on any person under that Act shall be served either personally or by registered post, hence the said portion on the above part of the notice issued to the applicant. As the first respondent failed to delete the relevant portion in the notice of seizure, this court cannot conclusively make a finding whether that notice was served personally or via AR registered to the applicant. Notwithstanding this finding, I ruled at this juncture that this is not fatal to the respondents' case vis a vis this application in light of the admission in the applicant's letter dated 14 April 2014 that it had received that notice.

[20] However, the counsel for the respondents did not answer this court's question during the hearing of encl 6 as to why was the notice of seizure dated 3 April 2014 although the seizure of the car was carried out on 8 January 2014. The learned counsel also did not furnish this court with any explanation as to why was the notice of forfeiture left undated. This court cannot fathom as to how could the appellant be expected to respond within one month from the date of the seizure (8 January 2014) when the notice of that seizure was only issued almost three months after the seizure.

[21] This court is fully appraised of the fact that it would and could only deal with these issues substantively during the actual trial of the applicant's OS, should the respondents' application to strike out the OS be dismissed.

[22] This court is fully conscious that in determining an application under O 18 r 19(1) of the ROC, I cannot deal with the merit of the substantive claim or attempt to resolve the conflicts of evidence in striking out proceedings (see *Meeriam Rosaline a/p Edward Paul & Ors v William Singam a/l Raja Singam (suing as Public Officer of Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh, Perak)* [2010] 4 MLJ 541 and *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156).

[23] Nonetheless, this court is entitled to look at the history of the case to determine if there is an action (see *Jamir Hassan v Kang Min* [1992] 2 MLJ 46) and to determine whether it can clearly be seen that the claim or answer is on the face of it is 'obviously unsustainable' (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; and *Hi-Summit Construction Sdn Bhd v Konsortium Lapangan Terjaya Sdn Bhd & Ors* [2015] 2 MLJ 247).

[24] I had perused the communications from the applicant to the respondents, the synopsis of which are as follows:

(a) letter dated 14 April 2014: this letter was sent by the applicant to the first respondent informing that the applicant had only realised that the said car was seized by the first respondent upon making stock checks and upon receiving the notice of seizure in April, about three months after the seizure took place. The applicant demanded for the car to be returned to it as the rightful owner;

(b) letter dated 20 May 2016: this was the applicant's letter addressed to the Royal Malaysian Customs' Headquarters in Putrajaya referring to a letter from the customs dated 12 May 2016. Through this letter, the applicant requested that it be allowed exemption from payment of duties as it cannot sell the said car. The aspplicant further informed that it is willing to pay the compound of RM5,000;

(c) letter dated 25 May 2016: this was the applicant's letter addressed to one Mr Idros Mokhtar, a Customs Officer at the Customs Enforcement Branch, Teluk Intan, Perak, who issued the 'Notis Tuntutan Duti Cukai Serta Tawaran Kompaun' dated 12 May 2016. By this letter, the applicant requested for a postponement of 60 days to pay the compound as it had applied for exemption from the payment of duties;

(d) letter dated 1 September 2016: this was the applicant's letter addressed to the Royal Malaysian Customs' Headquarters, reiterating its letter of

20 May 2016, requesting that the applicant be allowed exemption from payment of duties as it cannot sell the car. The applicant further informed that it will pay the compound of RM5,000. The applicant further informed that it intends to re-export the said car to the United Kingdom; and

(e) letter dated 10 October 2017: this letter was isued by the applicant's solicitor and addressed to the second respondent. Through this letter, the applicant's solicitor informed of the applicant's attempts to resolve the issue with the Royal Malaysian Customs by enumerating the letters above. This letter also informed of the applicant's proposal for a 'win-win' solution to the issue. At the same time, the applicant reiterated its request for the return of the said car.

[25] Having perused the communications from the applicant to the respondents as enumerated above, I found the applicant's contention bears merit. I rule that the applicant's cause of action against the respondent begins on 10 October 2017. As such, it is my ruling that the OS was filed within the time provided in s 2(a) of the PAPA.

[26] The principles governing O 18 r 19(1) application have been set out in a long line of authorities, which include the oft-quoted *Sarjit Singh Khaira v Government of the State of Sarawak & Anor* [1990] 2 MLJ 251; [1990] 2 CLJ 95 at p 97; [1990] 3 CLJ Rep 59 and *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7. In a nutshell, the gist of the decisions is that where a claim or pleading is shown to be obviously unsustainable, any limb of O 18 r 19(1) may be invoked to strike out that unsustainable claim.

[27] It is settled law that recourse to this summary process can only be adopted when it can clearly be seen that the claim is on the face of it obviously unsustainable. The summary power should be exercised in plain and obvious cases only and where the claim on the face of it is obviously bound to fail (*Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd* [2006] 4 MLJ 271; [2006] 2 CLJ 1021). This proposition is clearly explained in the Federal Court's case of *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1 at p 18; [2013] 6 CLJ 673 as follows:

> ... We also make this observation on the application of the court's summary power to strike out a pleading under O 18 r 19 of the Rules of Court 2012 (successor to the RHC 1980). Although the power to strike out is a wide discretion, it should be exercised with care and only when the threshold requirement of 'an obvious and unsustainable case', can a pleading be struck out.

[28] In essence, this court will only dismiss and strike out an action pursuant to O 18 r 19:

(a) in plain and obvious cases;

(b) where there is no reasonable cause of action;

(c) to avoid unnecessary trial which had no prospect of success;

(d) where the action is obviously unsustainable; or

(e) where the pleadings are entirely hopeless, baseless or without foundation in law or in equity.

(see *Duta Arif Sdn Bhd & Ors v Chartered Development Corp & Ors* [2008] 6 MLJ 139; *Alliance Investment Bank Sdn Bhd v Good Quantum Sdn Bhd & 3 Ors* [2010] MLJU 1679; *Nescajaya Sdn Bhd v Suairah bt Parigula & Ors* [2011] 9 MLJ 774; *Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 17 Ors* [2008] 2 MLJ 915; *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192; *Wesma Rubber Products v CIMB Bank Berhad* [2014] 1 LNS 479).

Order 18 r 19(1)(b): scandalous, frivolous or vexatious

[29] 'Scandalous' was decided to mean wholly unnecessary and irrelevant, not just unpleasant allegations: *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807; *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd*; *Godrej Sara Lee Ltd v Siah Teong Teck & Anor (Part 1)* [2007] 7 MLJ 153; *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11; *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam* [2011] 6 MLJ 70.

[30] The following illustrations had been decided to come within the meaning of the term 'frivolous or vexatious':

(a) no locus standi: *AIC Dotcom Sdn Bhd (suing in a representative capacity for MTEX Corp Sdn Bhd) v MTEX Corp Sdn Bhd* [2003] 4 MLJ 324; *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406;

(b) res judicata: *Abdul Hamid bin Hj Rahmat & Anor v Development & Commercial Bank Bhd & Anor* [1993] 1 MLJ 306; *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur (via his secretary Dato' Ahmad Tajudin bin Sulaiman)* [2010] 8 MLJ 57; *Datuk Ooi Han Eng & Anor v Soh Huang Siah (carrying on business through an organisation known as Alaric' s Productions Co)* [2010] 5 MLJ 665;

(c) wrong party is sued: *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240;

(d) illegality: *Lim Eng Heng v Lim Sam Keow & Others* [2003] MLJU 47;

(e) unfounded claims: *EON Bank Berhad v Cepad Group Sdn Bhd & Ors* [2006] 4 MLJ 362; or

(f) claim is statute-barred : *Sim Kiang Chiok v Southeast Asia Special Asset Management Bhd* [2016] 1 MLJ 57.

[31] Applying the principle enumerated above, this court does not find that the applicant's OS to fall under any of the illustrations enumerated above for it to be scandalous, frivolous or vexatious. The respondents' claim under O 18 r 19(1)(b), therefore, failed.

Order 18 r 19(1)(d): abuse of the process of the court

[32] The Court of Appeal in *Harapan Permai* held that where the process of court had not been used in a bona fide manner, it tantamount to an abuse of the process of the court.

[33] Some illustrations decided by the courts to fall within the meaning of the phrase 'abuse of the court process' are:

(a) the plaintif failed to name the tortfeasors, and the second defendant was wrongly named: *Zaina Abidin bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors* [2009] 6 MLJ 863; *Public Finance Bhd v S Ramasamy* [1990] 2 CLJ 431;

(b) parties have submitted themselves to the jurisdiction of the Syariah Court and seek to complain on the same matter in the High Court: *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793;

(c) an action to recover a debt is taken simultaneously with a foreclosure action in respect of the same debt : *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83; and

(d) re-agitating the same matter that had been finally adjudicated by the Federal Court and the Court of Appeal: *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors* [2002] 6 MLJ 171.

[34] Having perused the affidavits and the OS, and going by the numerous illustrations and examples laid down by the authorities cited earlier on what constitute an abuse of the court process, this court failed to find the existence of an iota of abuse of the process of the court in the applicant's action. Thus, the respondent's reliance under this paragraph must also fail.

[35] This court will always abide by the reminder of the Court of Appeal in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235 which was in the following term:

> the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347, had said that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution. It is a power which ought to be very sparingly exercised and only in very exceptional cases'.

CONCLUSION

[36] I cannot find at this juncture that the applicant's OS discloses no reasonable cause of action. Neither did I find that the OS is scandalous, frivolous or vexatious, nor an abuse of the process of the court.

[37] Instead, this court has found that the respondents' claims under O 18 r 19(1)(b) and (d) of the Rules of Court 2012 to strike out the plaintiffs' OS fail to stand in law.

[38] The respondents' application in encl 6 is dismissed with no order as to costs.

Application dismissed with no order as to costs.

Reported by Izzat Fauzan